BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROXANNA E. HELLER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,012,453
CONAGRA FOODS	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appeals the November 30, 2005 Award of Administrative Law Judge Bryce D. Benedict. Claimant was awarded a 30 percent permanent partial general body disability after the Administrative Law Judge (ALJ) determined claimant had suffered a series of accidental injuries arising out of and in the course of her employment with respondent through January 25, 2005. This matter was placed on the Board's summary calendar and deemed submitted on May 1, 2006.[1]

APPEARANCES

Claimant appeared by her attorney, Jeffrey K. Cooper of Topeka, Kansas. Respondent, a self-insured, appeared by its attorney, Mark E. Kolich of Lenexa, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the ALJ.

ISSUES

1. Did claimant suffer personal injury by accident arising out of and in the course of her employment with respondent?

2. What was claimant's date of accident?

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[1] K.S.A. 2004 Supp. 44-551(b)(1).

3. What was claimant's average weekly wage on the date of accident?

4. Did claimant submit a timely written claim?

5. What is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant started working for respondent on October 12, 1998, as an on-line pocket filler, boxer and palletizer. These production line jobs were done on a rotating basis and required claimant be on her feet 8 to 12 hours per day. Claimant also, at times, worked mandatary overtime including working on weekends. In 2002, claimant transferred to the tail cutter job because she thought it was a physically easier job. Claimant's job duties required she work on wet and slippery concrete floors. The tail cutter job also required she squat and bend to pick up meat off the concrete floor three to four times per hour. A stool was available for claimant to use, but due to the speed of the chain, she had little time to use it.

In 2002, claimant began noticing pain and discomfort in her knees. Claimant's pain began in her left knee and then spread to her right knee approximately one year later.[2] She notified the plant nurses of the knee pain, advising them she thought it was due to her work with respondent. No medical treatment was provided at that time. Claimant stated the pain in her knees at that time was at a two, on a scale from one to ten.

Claimant sought medical treatment on her own from orthopedic surgeon Allan D. Holiday, Jr., M.D., in Manhattan, Kansas. X-rays of both knees were taken, and Dr. Holiday diagnosed claimant with severe osteoarthritis of both knees. The x-rays displayed bone on bone in the medial compartment only.[3]

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[2] R.H. Trans. at 38.

[3] Baker Depo. at 21.

On January 25, 2005, Dr. Holiday restricted claimant to working a 40-hour week, maximum. This restriction also allowed for periodic sitting 15 minutes of each hour. Respondent was able to meet those restrictions, and claimant continued working for respondent at the time of the regular hearing. Claimant was earning $12.65 per hour at the time of the regular hearing. There is no other evidence in the record of claimant's hourly rate of pay at any time while working for respondent.

Except for the January 25, 2005 date, the record is not clear as to when claimant was first placed on the 40-hour restriction. Claimant did testify that Dr. Holiday placed her on the 40-hour restriction before the January 25 date, but could not testify as to the exact times. Also, claimant testified that Dr. Holiday placed claimant on a 40-hour week in 2003 and 2004.[4] (This is noted in a 2004 report from Dr. Ketchum, who treated claimant for a bilateral hand injury.) Claimant testified that, while Dr. Holiday placed her on the 40-hour limit in 2003 and 2004, she also worked overtime during both of those years. Accordingly, with the exception of the January 25, 2005 date, the evidence is inconclusive regarding when and for how long claimant was on a 40-hour-work-week restriction.

Claimant was referred by her attorney to board certified orthopedic surgeon Sergio Delgado, M.D., for an examination on May 1, 2003, to determine claimant's need for added treatment. Dr. Delgado diagnosed claimant with degenerative arthritis in her knees and recommended she work alternating sitting and standing, with mostly sedentary work. At the time of this examination, claimant had been restricted to a 40-hour week.[5] The record does not indicate if this restriction was permanent or whether or not respondent was accommodating this restriction. Dr. Delgado rated claimant, pursuant to the fourth edition of the AMA *Guides*,[6] at 20 percent to each knee. However, neither Dr. Delgado's testimony nor his report of June 25, 2004, specify whether the 20 percent rating is to the lower extremity or the whole body. Dr. Delgado does discuss table 62 of the AMA *Guides*, but that table was not placed into this record.

Dr. Delgado testified regarding the cause of claimant's knee problems. He opined that while claimant's work did not cause the degenerative arthritis, it did aggravate it, and the fact claimant worked on a concrete floor was also an aggravating factor.[7] He acknowledged that claimant's weight was also a factor. At the time of his first examination,

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[4] R.H. Trans. at 41-43.

[5] Delgado Depo. (March 28, 2005) at 7.

[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[7] Delgado Depo. (March 28, 2005) at 7, 12 & 13.

claimant stood 5 feet 2 inches and weighed 228 pounds. At the regular hearing, claimant testified she weighed 233 pounds.

Dr. Delgado examined claimant a second time on June 24, 2004. At that time, he recommended claimant avoid prolonged standing and squatting, with prolonged being two-thirds of the day or more. He testified claimant's job will continue to aggravate the condition. He also stated claimant will ultimately require knee joint replacements bilaterally. The timing of these surgeries will depend on claimant's ability to withstand pain. At his last examination, claimant weighed 233 pounds.[8]

Claimant was referred by her attorney to board certified orthopedic surgeon Theodore L. Sandow, Jr., M.D., on October 18, 2004. Dr. Sandow also diagnosed claimant with bilateral osteoarthritis in her knees and opined her work with respondent aggravated her condition. He found claimant's condition to be the result of traumatic wear and tear, with the cartilage in both knees worn away to the point claimant was bone on bone. He acknowledged that claimant's weight, at the time of the examination, was 252 pounds, which would contribute to the problem, but also stated that claimant's work was a contributing factor. He rated claimant at 30 percent whole body impairment pursuant to the fourth edition of the AMA *Guides*.[9]

Claimant was referred to board certified orthopedic surgeon Phillip L. Baker, M.D., by the ALJ for an independent medical examination on April 22, 2004. Dr. Baker found claimant to have significant tri-compartmental arthritis in her knees. He testified that osteoarthritis is a wear-and-tear disease which wears the cartilage away until the knees are bone on bone. He stated that excess activity may be related to the progression of the disease,[10] but later testified claimant's work would not aggravate the condition.[11] He acknowledged that the x-rays from April 9, 2002, displayed bone on bone in the medial compartment only, with claimant displaying tri-compartmental bone on bone at the time of his examination. He stated that anytime claimant would stand or walk would increase the load on her knees and increase the damage. He attributed this to her obesity, rather than her work.

The parties took the deposition of orthopedic surgeon Roger W. Hood, M.D. Dr. Hood did not examine claimant, but was provided her medical records from Drs. Sandow, Navato, Holiday and Baker. Dr. Hood had only one report from Dr. Delgado,

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[8] Delgado Depo. (March 28, 2005) at 24.

[9] AMA *Guides* (4th ed.).

[10] Baker Depo. at 12.

[11] Baker Depo. at 15.

that being the one dated June 25, 2004. Dr. Hood did not have the actual x-rays of claimant's knees. He acknowledged claimant's medical history indicated bone on bone in the medial compartment in 2002, with tri-compartmental bone on bone in 2004. He agreed this showed progression of the disease. Dr. Hood testified that claimant's weight would accelerate the disease process, but did not cause it. He opined that having to stand on concrete 8 to 10 hours a day would not accelerate the arthritis, but would increase claimant's pain. He testified that claimant's work was not the aggravating factor here. He instead laid the blame on claimant's weight. But he also agreed that a person's activity would affect the speed of the wear and tear in the joint. He also recommended that claimant avoid working on slick surfaces.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[12]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[13]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[14]
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> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act

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[12] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[13] K.S.A. 44-501(a).

[14] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

> to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.[15]

The medical testimony is in conflict regarding the effect claimant's work had on her bilateral knee arthritis. While Drs. Baker and Hood testified that claimant's work did not affect the condition, Drs. Delgado and Sandow testified the work was an aggravating factor.

The Board finds the testimony of Drs. Delgado and Sandow to be the most credible. Dr. Baker testified that excess activity may be related to the progression of the disease process, but then stated work would not aggravate it. This claimant was working 8 to 12 hours per day on slick concrete surfaces. This would appear to qualify as excess activity. The Board acknowledges that claimant's weight was a factor in the progression of claimant's disease process. But claimant's work also aggravated the condition and the need for replacement surgery.

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[16]

Claimant's date of accident is complicated. When dealing with a series of repetitive trauma injuries which occur microscopically over a period of time, the Kansas appellate courts have established a bright line rule for identifying the date of injury in a repetitive, microtrauma situation. The date of injury for repetitive injuries in Kansas has been determined to be either the last day worked or the last day worked before the claimant's job is substantially changed.[17]

Here, the evidence indicates claimant's job was changed to permanently restrict her to only working 40 hours per week as of January 25, 2005. While there is indication that the 40-hour limit may have been applied in 2003 or 2004, there is no indication whether those limitations were permanent. The Board finds claimant's date of accident to be the date Dr. Holiday permanently restricted her to working only 40 hours per week, on January 25, 2005.

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[15] K.S.A. 44-501(g).

[16] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[17] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .[18]

The parties agree that written claim was submitted in this matter no later than August 27, 2003. Therefore, with a date of accident of January 25, 2005, claimant's written claim is timely.

K.S.A. 2004 Supp. 44-511 directs how an average weekly wage is to be computed. Here, claimant was paid by the hour. The only evidence in the record regarding her hourly rate was in the regular hearing, where claimant testified to a rate of $12.65.

The ALJ, in the Award, stated:

> It is Claimant's burden to prove what her wage loss is. She must first establish her average weekly wage. Exhibit 1 to the regular hearing indicates her average overtime was $13.22 a week. As to her base wage, the only testimony in the record is that her wage as of the regular hearing was $12.65 an hour (or $506.00 for a 40 hour work week.) Exhibit 1 shows that in the 26 weeks preceding the date of accident the Claimant's base wage paid fluctuated wildly, from a low of $211.81 to a high of $531.56; in addition to the higher figure the Claimant also earned $38.34 in overtime for that pay period. Similarly, in the 16 weeks following the date of accident, when the Claimant was supposedly restricted to a 40 hour work week, her wages varied from $270.72 to $525.36, and there were two weeks in which the Claimant earned overtime.[19]

Claimant's overtime averaged $13.22 per week in the 26 weeks leading up to the date of accident. Therefore, claimant's average weekly wage on the date of accident is $519.22.

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association

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[18] K.S.A. 44-520a(a).

[19] Award at 4.

> Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[20]

Here, the record contains only two opinions regarding claimant's functional impairment. Dr. Sandow assessed claimant a 30 percent whole body functional impairment for claimant's bilateral knees. Dr. Delgado assessed claimant a 20 percent impairment for the knees, but does not clarify whether that impairment is to the lower extremities or the whole body. Naturally, respondent claims the rating is to the lower extremities, with claimant arguing the impairment is to the whole body. Claimant cites table 62 of the AMA *Guides* in support of her position. While Dr. Delgado did mention table 62, the table was never placed in evidence. The Board has, in the past, taken judicial notice of the AMA *Guides*, but only for the purpose of utilizing the conversion chart.[21] However, such use of the conversion chart added no evidence to the record. Here, to use the AMA *Guides*, table 62, would add to the record and would certainly add to Dr. Delgado's testimony. The Board, therefore, rejects claimant's referencing the *Guides* to explain Dr. Delgado's testimony. Thus, the only certain rating opinion is that of Dr. Sandow, which the ALJ, and now the Board, adopts. Claimant is awarded a 30 percent permanent partial disability on a functional basis for the injuries suffered each and every working day through January 25, 2005.

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[22]
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> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the

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[20] K.S.A. 44-510e(a).

[21] *McGrady v. Delphi Automotive Systems*, No. 199,358, 1998 WL 229871 (Kan. WCAB Apr. 6, 1998.)

[22] K.S.A. 44-510e.

> employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[23]

Claimant's average weekly wage on the date of accident was $519.22. After claimant was restricted to a 40-hour week in January 25, 2005, claimant's overtime was reduced, but not eliminated entirely. In the weeks leading up to the regular hearing, claimant averaged $2.20 per week in overtime, while earning an hourly rate of $12.65 which computes to a weekly wage of $506.00. Thus, claimant has a post-injury average weekly wage of $508.20. Under K.S.A. 44-510e, if claimant is earning at least 90 percent of the average weekly wage she was earning on the date of accident, she is limited to her functional impairment. Here, claimant is earning a post-injury wage that is within 2 percent of her original average weekly wage. Therefore, claimant is limited to her functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated November 30, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeffrey K. Cooper, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge

[23] K.S.A. 44-510e.

Paula S. Greathouse, Workers Compensation Director